COMMITTEE REPORT NO. 16-14(6) TABLED ON SEP 30 2003

14th Legislative Assembly of the Northwest Territories

Standing Committee on Accountability and Oversight

Report on the Review of Bill 27:
An Act to Amend the Access to Information and Protection of Privacy Act

Chairperson: Mr. Charles Dent, MLA

105-00491/

Northwest Territories Legislative Assembly
Standing Committee on Accountability and Oversight

SEP 30 2003

THE HONOURABLE ANTHONY (TONY) WHITFORD, MLA
SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Accountability and Oversight has the honour of presenting its Report on the Review of Bill 27: *An Act to Amend the Access to Information and Protection of Privacy Act*, and commends it to the House.

Charles Dent, MLA
Chair

P.O. Box 1320
Yellowknife
Northwest Territories
X1A 2L9
T: (867) 669-2299
F: (867) 873-0432
www.assembly.gov.nt.ca

MEMBERS OF THE STANDING COMMITTEE ON ACCOUNTABILITY AND OVERSIGHT

Committee Members

Charles Dent
MLA Frame Lake
Chair

Floyd Roland
MLA Inuvik Boot Lake
Deputy Chair

Brendan Bell
MLA Yellowknife South

Bill Braden
MLA Great Slave

Paul Delorey
MLA Hay River North

Jane Groenewegen
MLA Hay River South

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MLA Mackenzie Delta

Leon Lafferty
MLA North Slave

Sandy Lee
MLA Range Lake

Michael McLeod
MLA Deh Cho

Steven Nitah
MLA Tu Nedhe

Committee Staff

Doug Schauerte
Deputy Clerk

Colette Langlois
Director, Research Services

Donna Huffam
Research Analyst

Katherine Peterson
Law Clerk

Charles Thompson
Deputy Law Clerk

INTRODUCTION

The Standing Committee on Accountability and Oversight is pleased to report on its review of Bill 27, *An Act to Amend the Access to Information and Protection of Privacy Act*.

The *Access to Information and Protection of Privacy Act* (the Act) was passed by the Legislative Assembly of the Northwest Territories in 1994, and came into force on December 31, 1996. The stated intention of the Act is to "promote, uphold and protect access to the information that government creates and receives and to protect the privacy rights of individuals".

The Act provides for the appointment of an Information and Privacy Commissioner (the Commissioner), who is an independent officer of the Legislative Assembly. The current Commissioner, Ms. Elaine Keenan-Bengts, was appointed on July 1, 2000 for a five-year term. Under Section 68 of the Act, the Commissioner is required to submit an Annual Report to the Assembly. This Committee has taken on as part of its mandate the responsibility to advocate for the rights of the public to a more open and transparent government, and has made it a practice since 1999-2000 to undertake reviews of the Commissioner's reports, and to in turn report back to the Assembly with its recommendations and findings.

Since it first began reviewing the Commissioner's reports, the Committee has made several recommendations for changes to the Act to address problems pointed out by the Commissioner. Members were pleased to see that Bill 27 addresses some of these recommendations, the details of which are explained below.

PUBLIC REVIEW OF BILL 27

The Committee held an initial public hearing with the Minister on August 29, 2003. A further hearing took place on September 19, 2003, at which the Committee heard from the Commissioner and the Minister, and conducted its clause by clause review. During the clause by clause review, two motions to amend the Bill were carried by the Committee and concurred with by the Minister. The substance of these motions is discussed below. Following clause by clause review of the Bill, a motion was carried to report Bill 27 as amended back to the Assembly as ready for consideration in Committee of the Whole.

POWER TO SUBPOENA WITNESSES

Bill 27 provides the Commissioner with the power to summon witnesses and require them to give evidence. This power only applies to reviews of access to information complaints. These provisions respond to recommendations made by both the Commissioner and the Committee, and both were pleased to see them included in this Bill.

POWER TO INVESTIGATE AND MAKE RECOMMENDATIONS ON PRIVACY COMPLAINTS

Bill 27 also provides the Commissioner with the power to review complaints that a public body has collected, used or disclosed personal information in violation of the privacy provisions under the Act. These provisions were also in response to recommendations, and were welcomed by both the Commissioner and the Committee.

Two amendments were made to these provisions during the clause by clause review of the Bill. The first deleted a proposed section which dealt with evidence given by witnesses, as the Commissioner will not have the power to summon witnesses in conducting a review of a privacy complaint. The second amendment clarifies the process to be followed by a public body after receiving the Commissioner's report on a privacy complaint. Within 90 days, the public body must decide whether or not to follow the Commissioner's recommendations, and must give written notice of its decision to the Commissioner and the person who requested the review.

DEEMED REFUSAL

During its public hearings, the Committee had lengthy discussion with the Information and Privacy Commissioner on the "deemed refusal" provisions contained in Bill 27. The Committee has also discussed this same issue with the Commissioner during its reviews of her last two reports. Because the Committee adopted a position that was not favoured by the Commissioner, Members felt it was important to explain their reasons for doing so in detail.

The change in the legislation is designed to address a gap in procedure that currently exists with respect to access requests and a review of an access request by the Commissioner. Under the present legislation, a person can request information from the head of a public body. If the applicant disagrees with the decision of the public body respecting access to the information, he or

she may request the ATIPP Commissioner to review the decision. When the Commissioner has conducted a review, a report which may contain recommendations is prepared by the Commissioner and provided to the Applicant and to the head of the public body. The head of the public body was then required to make a decision as to whether the recommendations of the ATIPP Commissioner would be followed or not, and to advise the ATIPP Commissioner and Applicant of this decision.

The difficulty is that the legislation did not provide for any further remedies. If the head of the public body did not respond to the recommendations of the Commissioner, there appeared to be no further action which could be taken by an Applicant. It therefore became necessary to address this gap in the legislation so that recommendations could not be ignored without consequences. All agreed that this situation had to be fixed. However, there was disagreement as to how best to remedy the legislation.

The Commissioner felt that the best approach was to have a "deemed acceptance" provision in the Act. This would mean that if the head of a public body did not respond within the stipulated time to recommendations made by the Commissioner regarding the request for access to information, the head of the public body would be taken to have accepted those recommendations and act accordingly. She felt that this would be the clearest and simplest solution to the issue. She advised the Committee that recommendations contained in her report are often detailed and there may be many recommendations contained in the report. She was of the view that if a "deemed refusal" provision was put in, namely a statement that if the head of the public body does not respond within the time required, he or she is deemed to have rejected the recommendations of the ATIPP Commissioner, it would cause confusion.

The Committee had previously recommended in reports previously made to the Assembly, that a deemed refusal provision was the most appropriate way of solving the problem. It came to this conclusion because:

- This issue has been solved in this fashion by other provinces in their ATIPP legislation, whereas no other jurisdiction has adopted a "deemed acceptance" approach;
- There is equal opportunity for confusion, whether the recommendations are deemed to be accepted or deemed to be refused;
- The general role of the ATIPP Commissioner is akin to an Ombudsman. The power of the Commissioner is that of making recommendations. It is up to an applicant to take matters to Court for an order if he or she is unhappy with the result. A deemed acceptance provision would have the effect of giving order making authority to the ATIPP Commissioner and this is not what the legislation as a whole intends;

- Deemed refusal is more consistent with a failure to respond, or saying nothing, than is deemed acceptance;
- The problem being addressed does not frequently occur as, in the vast majority of cases, department heads respond within the time set out in the legislation. During the public hearings with the Minister, Justice staff advised that according to their records there has only been one time in the history of the Act that a Department has failed to respond within the allotted thirty days.

The Committee's decision to support the "deemed refusal" provision was not made lightly. Members wish to assure the Commissioner that full consideration was given to her views and concerns. The Committee strongly believes that this provision provides the best protection for NWT residents.

OUTSTANDING ISSUES

The Committee is disappointed that the Government has not pursued amendments to include municipal governments under access to information and protection of privacy laws. In its reports on the Commissioner's 1999/2000 and 2000/2001 reports, the Committee fully supported the Commissioner's recommendations that either separate legislation be developed to deal with municipalities, or municipalities be included under the existing Act.

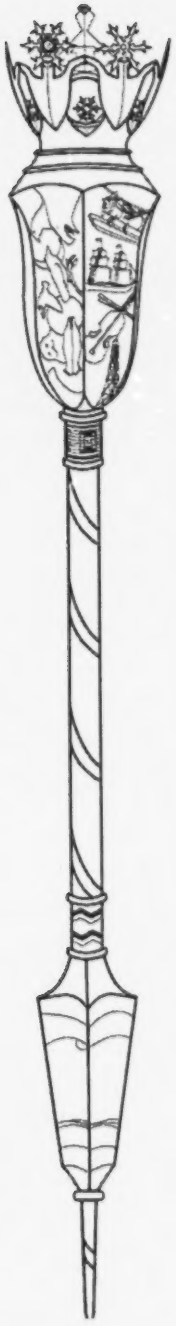
The Committee is also concerned that the federal government now has the authority under the *Personal Information and Electronic Documents Act* to regulate how the private sector in the NWT collects, stores and uses personal information. The Committee recommended in its review of the Commissioner's 2000/2001 report that the Government establish legislation in order to avoid federal jurisdiction in this area and to ensure that local privacy issues are regulated by made-in-the NWT laws. Members are disappointed that the Government has not pursued the development of legislation in this area.

ACKNOWLEDGEMENTS

The Committee would like to thank the Minister and his staff for presenting the Bill.

The Committee would also like to thank the Commissioner for her submission on Bill 27, and also for her advice and cooperation over the last three years, which has resulted in many of the amendments contained in the Bill. The Committee is confident that these amendments will ensure better access to information and privacy protection for NWT residents.

APPENDIX A



Northwest Territories Legislative Assembly

Standing Committee on Accountability and Oversight

Public Review of
Bill 27, An Act to Amend the
Access to Information and Protection of
Privacy Act

Chair: Mr. Charles Dent, MLA

STANDING COMMITTEE ON ACCOUNTABILITY AND OVERSIGHT

Chairman

Mr. Charles Dent, MLA, Frame Lake

Members

Mr. Floyd Roland, MLA, Inuvik Boot Lake, Deputy Chair
Mr. Brendan Bell, MLA, Yellowknife South
Mr. Bill Braden, MLA, Great Slave
Mr. David Krutko, MLA, Mackenzie Delta
Mr. Leon Lafferty, MLA, North Slave
Ms. Sandy Lee, MLA, Range Lake
Mr. Steve Nitah, MLA, Tu Nedhe

Witnesses

Ms. Elaine Keenan-Bengts, Access to Information and Privacy Commissioner
Hon. Roger Allen, Minister of Justice
Ms. Janice Laycock, Acting Director, Policy & Planning, Justice
Ms. Janis Cooper, Legislative Counsel, Legislation Division, Justice
Ms. Cayley Thomas, Legal Counsel, Policy & Planning, Justice

Committee Staff

Mr. Doug Schauerte, Committee Clerk
Mr. Charles Thompson, Deputy Law Clerk
Ms. Colette Langlois, Director of Research
Ms. Katherine Peterson, Law Clerk

STANDING COMMITTEE ON ACCOUNTABILITY AND OVERSIGHT
Public Review of Bill 27, An Act to Amend the Access to Information and Protection and Privacy Act
September 19, 2003
Committee Room 'A'
9:30 a.m.

CHAIRMAN (Mr. Dent): CHAIRMAN (Mr. Dent): Alright. We'll come back to order now. The Standing Committee on Accountability and Oversight. We're on item number five, which is a public hearing on Bill 27, witness presentations. I'd like to welcome our Access to Information and Protection of Privacy Commissioner, Ms. Keenan-Bengts, to the witness table. Ms. Keenan-Bengts, I understand you have a presentation and I'd welcome you to begin with that, if you're ready.

Opening Comments by Ms. Keenan-Bengts

MS. KEENAN-BENGTS: Thank you. I don't really have a prepared text. What you do have is a letter that I wrote on August 27th. For the most part, the proposed amendments I'm very pleased to see; in particular, the provisions dealing with providing my office with the ability to review privacy concerns. I think that was very much needed in the act and I'm very glad to see it. As I point out in my letter, however, I think something has to be added to that because once a recommendation is made on a privacy issue it seems, the way it's drafted at the moment, to simply hang in limbo. There's no obligation for anyone to deal with that recommendation in any way. I don't think that a recommendation on a privacy issue can or should be dealt with in the same way as a review recommendation on an access issue, but I do think there should be something in the legislation that says what is to be done with a privacy recommendation.

There is, however, one area that concerns me, and it concerns me so much that I would say I'd rather see no amendments at all than to see it passed this way. That is, as always, deemed acceptance/deemed refusal clause. There seems to be some concern that by giving the Information and Privacy Commissioner, be it me or my successor, the ability to make a recommendation that would be deemed to be accepted if not responded to within a period of time gives this office more power. It doesn't. The legislation already says the Minister or the head of the public body must respond to a recommendation within 30 days. That doesn't change. The only thing that changes is what happens when -- and it does happen, not as often as it used to, but it does happen still -- the head of the public body doesn't respond within that 30 days. There has to be something that happens.

My suggestion all along has been that in that event, since you're paying somebody who, in theory, has some expertise in the area, who has considerable experience with the act, and as I say, you're paying to give recommendations, it seems to me the most effective way of dealing with it is that you're deeming those recommendations to be

accepted if they haven't otherwise been dealt with. If they have been dealt with within the 30 days, as they should be dealt with within the 30 days, it gives the Information and Privacy Commissioner no more power, no more clout, than the act currently has.

What a deemed acceptance rule would do is merely ensure that the heads of the public bodies who are required by legislation right now to deal with the recommendation within 30 days actually do it. That will be the only result. A deemed refusal rule, I continue to say, will cause nothing but confusion.

I've brought along one of my recommendations to try and make that point. This was a recommendation made March of this year. If you just go to the end of it, the conclusion and recommendation which is on page 10, the very last page. I would invite you to read the whole thing because it does set out the reasons, my evaluation, my interpretation of the act and everything else. But the conclusion is that the Department of Justice was correct in its interpretation of the access to information act insofar as part of the request for information was concerned, but was not with respect to another part.

So we come to a deemed refusal. What is being refused here? Is it the part that was accepted? Was it the part that was rejected? Or that different recommendations were made than the department made in the first place? There's just no way to know what happens next. With a deemed acceptance, the recommendations are often 20, 24, 25 pages long. They are detailed. They go through a clear statement of...For example, when editing is proposed what normally happens is I will provide a copy of the record with the proposed editing included. If, for example, I were to say, here's a contract, most of this information should be released to the public. There are certain parts of it that shouldn't be and that's information about the business practices of a company, the exact amount of the contract, the proprietary information in the contract. If I recommend that the contract should be released, but with certain editing and there's a deemed refusal, what does it mean? Does it mean the whole contract should be released? Does it mean that none of the contract should be released?

It's confusing. Deemed acceptance is clear. It's all there in the recommendation exactly what should be done and I can't emphasize enough the fact that if the heads of the public body react within the 30 days they're supposed to under the act, there are no consequences. I think that's my most important point here. All I'm trying to do here is to get the heads of the public bodies to react within the 30 days. The only way to do that, it appears, is to make there to be consequences if they don't.

I feel very strongly, I feel so strongly about this particular point that I really would rather see no amendments whatsoever than to see a deemed refusal clause which I believe will just lead to so much confusion that this office will be redundant. It simply won't be worth paying somebody to do the work. I'd be happy to answer any questions.

CHAIRMAN (Mr. Dent): Thank you, Ms. Keenan-Bengts. Just on your first point that you raised, the committee is going to propose an amendment to the bill that will deal with your first concern on the privacy recommendations and requiring the head of the

public body to follow up and respond to both the Commissioner and the applicant as to how they're going to respond to the recommendations. The second one, Mr. Bell, you had some questions or comments.

General Comments

MR. BELL: Yes, Thank you. We've been dealing with this issue now several times and I can certainly sense the frustration that I think you're feeling and I'm sure you're thinking that you've made this case before, we just don't seem to get it. Maybe that is the case. Maybe we don't. It sounds like it should be fairly simplistic, but every time I try to contemplate this it causes me problems. Maybe you can set me straight here.

It really is irrelevant, as you say, if the department responds as you've recommended within the 30 days. So now we're just talking about a non-response after 30 days. Now, in my mind, if after that non-response it's deemed that they've refused your recommendations, well now we have some certainty and there can be a course of action. You can go to court, you come to the political level and say these guys are refusing my recommendations, we need to lay some pressure. And that will be certainly a decision for us to make, or the court could order that they actually accept your recommendations. If it's a deemed acceptance and they've done nothing, why can't they just continue to do nothing, give you a little bit of this here, you know, six months down the road a little more, a couple of interviews later. They sort of only half-hearted cooperate for years down the pipe before we really recognize that, you know, although they've said they'd cooperate and accept the recommendations, geez, they haven't really been interested in playing ball here at all and they've stonewalled at every level. It seems to me that the deemed refusal gives some certainty. Okay, we know they aren't interested in cooperating. Let's deal with that right now. So that's the hurdle that I have in my mind and I see that's not how you've seen this. Thank you.

CHAIRMAN (Mr. Dent): Thank you.

MS. KEENAN-BENGTS: Thank you, Mr. Chairman. In fact, I see it exactly the opposite. If there's a deemed acceptance, then the applicant who has a recommendaton in writing from the Information and Privacy Commissioner can take it off to court and say please enforce this. With a deemed refusal, first of all they have to go to court to determine what the heck the refusal means, then to enforce it. Instead of a one-step process it's now a two-step process. Because what does a deemed refusal mean? Does it mean that the original decision of the department or public body stands fully? Does it mean that only those parts of the original decision that are in agreement with the Privacy Commissioner's recommendation stand? Does it mean that all of the recommendations of the Privacy Commissioner, even those that she agreed with the original decision, are rejected? Because in many of these, and in fact in most of these recommendations, we're talking about more than one record and we're talking about more than one recommendation.

So, which of the recommendations are being accepted? Which are being rejected? It will be, in my mind, total confusion. Now, eventually when it's gone to, when five or six people have taken the initiative to take it to court to figure out what the heck a deemed refusal actually means then perhaps in three, four, five, six years maybe we might have more certainty. It seems to me that we'll have a lot more certainty if we simply say deemed acceptance and away we go.

It just doesn't make sense to me, quite frankly. I've gone through this over in my head a thousand times to try and figure out why it is that a deemed acceptance rule seems to be difficult. Is it because everyone else in the country does it this way? My response to that would be our legislation is different than everyone else's. The way we do things is different than everyone else's. I think a far more effective and efficient way of doing it would be a deemed acceptance.

CHAIRMAN (Mr. Dent): Mr. Bell.

MR. BELL: I guess the one last thing I would say about what's being refused if it's deemed to be refused, I would say that everything that hasn't been responded to within the 30 days. So if there are 24 recommendations, the 22 they've responded and moved on in the first 30 days, well, we know those have been accepted because they've acted. It's just the other two they haven't moved on in those first 30 days that clearly they're refusing.

MS. KEENAN-BENGTS: Well to my...sorry.

CHAIRMAN (Mr. Dent): Because we're on the record...

MS. KEENAN-BENGTS: Yes, I do understand.

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: So the potential there is that the public body has originally decided to release certain personal information of a third party and the Privacy Commissioner said, no, I don't think the act allows you to do that because of the privacy provisions of the act. That means a deemed rejection would have the personal information or the third party information that should have been protected released to the public. I have problems with that. It's not what's not given out that causes me concerns. It's what is given out that causes me concerns.

CHAIRMAN (Mr. Dent): Mr. Bell.

MR. BELL: Just so I'm absolutely clear here then, the real concern is in privacy issues, not access issues on this.

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: They're intertwined. Very often what the application for is, I want copies of all of the contracts the Government of the Northwest Territories entered into with six different companies. In some cases I have recommended that, no, certain information, where the public body has said, yes, I think we should release this information, the third party has come to me and said, no, we don't want you to and this is why. I have turned around and made a recommendation, well, you're right in some respects. Parts of this should be released, but the specifics of it should not be. So that's part of the problem, yes. And the confusion that's going to arise is when you say what parts of it are you going to follow, what parts of it aren't you going to follow.

The other thing is that a Minister or a head of a public body can make a decision that has nothing to do with my recommendations. My recommendations, to my mind, have always been guidelines. This is how I see this. I wouldn't have said this six years ago when I started in this position, but I think I can say it now, I think I have a bit of an expertise in the act. I think that I understand the nuances of the act. I think I understand the purposes of the act. I have the opportunity to study it a lot more than any head of any public body, than any Member of the Legislative Assembly and I see my role as giving you the benefit of that experience. If you don't want to accept my recommendations, that's fine, you know. You're not going to hurt my feelings and that's part of the process. But I think that the fact of the matter is, I am here to give guidance and I would hope that that guidance would assist the head of a public body. If they don't accept all of my recommendations or they choose to change it somewhat, that's what the act allows for and the way the act works. But a deemed refusal will, to my mind, just make problems, create problems where none exist right now.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: Thank you. I think everyone here wants to understand, I mean, well, for me anyway. I shouldn't be speaking for everybody else. Obviously you feel very strongly about this recommendation and I do want to understand it, but a couple of things, what's being recommended here, especially the deemed...I'm speaking to the deemed refusal versus deemed acceptance. There are a couple of things about that that are counterintuitive, and that's the first thing. The second thing is, I'm not clear about your argument about the fact that making a refusal to disclose deemed refusal being more confusing because, as Mr. Bell said, because you're saying if they do...This is so difficult to explain.

Okay, let me just say, first thing, what I mean by counterintuitive, if somebody says no, that's deemed, you know, it's just naturally. Somebody is not doing what you're asking them to do. Right? If you recommend, you've reviewed the case and you're saying, okay, these things could be not released, but a, b, c, d should be released and you see no action or you see part action or inaction. It's just not being completed. So the natural response and natural instinct is, that's refusal. So this motion will say when you do not do something or you do not complete what you're being asked to do by the Commissioner, then we're going to deem that a refusal and that, we are thinking that you could take it to court or to go to necessary bodies and say, I've asked them to do

this or not do this and they're refusing to do this. So it's deemed refusal and maybe there could be something in the act that would trigger what happens when somebody doesn't do something. You know, whether it's do something or not to do something, but they do something contrary then you should be deemed not following the instruction.

But you're saying that would cause more confusion in that aspect, but that if you asked them to do something and they don't do it then it's deemed acceptance and that's more clear. It's hard to make that argument because, you know what I mean? I need some help here. I need more convincing evidence to show that, from you, that why this is so much less confusing because we're going against two things. One is, it's counterintuitive, and the second thing is, it's not done anywhere else. And the third thing for me is that we are legislating positive action on legislation. By them doing that something, it's deemed to be doing something, which is going a second step to, you know, sort of...So you could tell, I'm sure you can see that we're far away from accepting your recommendation, but I'm ready to be convinced.

CHAIRMAN (Mr. Dent): If I could just add to that. I think nobody in committee has worried about the Commissioner having too much power with this. It really is that this does seem counter to what we'd normally do with legislation, and that is that somebody follows the legislation or they deem not to. It doesn't seem to be for us the usual standard and we're, sorry, I think that's, and as you pointed out, the standard situation across Canada. There's no other jurisdiction that uses deemed acceptance. So, yes, we don't have to be the same as everybody else, but it does make it easier for us to know that we're doing things sort of in the normal course of events. Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: Oh, there are a lot of things I'd like to say. Number one, in some jurisdictions the Information and Privacy Commissioner actually makes the orders. So I disagree with you in terms of this is the way it's done throughout Canada because in some jurisdictions -- and I wouldn't want our act to be changed to give me order power -- that does exist.

The Access to Information and Protection of Privacy Act is very complex legislation. It is the kind of legislation that requires an awful lot of interpretation and the word counterintuitive has been used. It's not necessarily a very intuitive act. The more time I spend with the act, the more I see that it has a lot of ways that it could be interpreted. I don't see, frankly I see, although it may be counter to the way that legislation normally is done to provide for a deemed acceptance, and I don't know anything about that, to me a deemed refusal rule is counterintuitive to common sense.

It seems to me, and I've said it before and I don't want to repeat myself again and again, you're paying somebody who has some knowledge of the act to give recommendations. If those recommendations are not responded to within 30 days, to my mind the intuitive thing is to say, well, then, let's go with the expert. To me, that's the intuitive thing to do. What a deemed refusal rule is, if it's not reacted to within the 30 days, let's go against what your expert says and refuse.

The other thing is that, as I tried to point out, part of the problem with a deemed refusal rule is that the potential is that information will be released that really shouldn't be released and I suppose at the very bottom line that is my biggest concern. The Information and Privacy Commissioner, at least, this Information and Privacy Commissioner will always err on the side of personal privacy. If a court of law wants to counter what I say, that's fine. If the head of a public body wants to, after looking at a recommendation, counter it, that's fine. But my concern, the bottom line is that personal information or confidential third-party information will be released by a public body against the recommendation of the Information and Privacy Commissioner. That, at the very bottom line, is my biggest concern.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: So could you give an example of when that happens? Are you saying that there's a request for information that's private and you recommend that they should not be released and the governments do it?

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: Okay, let me try and figure a scenario. There was, and I can actually use a situation that arose. There was a case where the Department of Health and Social Services, I believe it is, who regulates day homes, received a request from an individual for everything that related to a particular day home, every document that they had with respect to a particular day home. There was a dispute between the day home owner and one of her customers. It was a legal dispute.

The department, in that case, was truly conflicted about what they should do. Much of the information was personal information because the day home was an unincorporated company. There was a lot of financial information included. On the one hand, they didn't want to give that information out. On the other hand, the applicant had a legitimate request for the information. In accordance with the act some of it might have been protected and some of it might not have.

In that particular case, the access to information and protection of privacy coordinator was truly conflicted about what he or she should do, they called me before they made a decision. I said, you know what? Your best bet is to refuse to give everything and then I can look at it in the fullness of time with all of the information before me and I can make a recommendation. The alternative for her at the time was to release all of the information except names and addresses. In the end, the recommendation I made, in fact that's what she had been planning to do. In the end, I reviewed all of the relevant documents and I made specific recommendations about what parts of it could/should be released and what parts of it shouldn't be. And it was very different than what the access to information and protection of privacy coordinator originally had thought to do.

In a deemed refusal era, I mean, that case is a little different because they asked me for my opinion first before making an original decision, but that's not always going to

happen. Let's say, for instance, she had simply made the decision. In that case, a lot of financial information about this day home would have been released to the third party and to my mind it was confidential information that never should be released to the public. It was personal. It wasn't even just business financial information. It was personal financial information. Deemed refusal, then that stuff goes out the door, doesn't it? The financial information is released.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: Okay, well. I don't know if having a clause either it's deemed refusal or deemed acceptance would have made any difference in that case. I think people would come to you for advice and they're going to do with it, I mean, that person made a decision regardless. I guess I still think, you made a point about, the strongest I see from your position is that you want to go for the efficiency. You know, if you make a recommendation it should be deemed accepted and they should do what you're recommending them to do and if they do not then you have grounds, I don't know, to take further actions. I still think we're not going with...Legislature is, you know, a legislative body.

You have you as the Commissioner=s office on the one hand and you have governing bodies that where the information is being asked to be provided or privacy protected and then you have the public interest, I mean the private citizens whose interests we're all here to protect. I don't think we're necessarily not giving you credit or being with you or empowering you by saying when you make a recommendation, they don't follow it, it's deemed refusal because they're obviously going against whatever recommendation you're making and I don't see still how that makes it any less, that makes it any, you know...That doesn't help you in saying if you make a recommendation whether to don't do it or do it, you know, you should release this information under access and you should not release this information because it's private. If they don't follow your recommendation it's a refusal and we're saying that's deemed refusal and we should put provisions there for you to be able to have a recourse in.

I just don't see how the deemed refusal makes it any more difficult than deemed acceptance. Deemed acceptance, it's like we have this law and just because there's this law everybody has assumed to have been following it, which is not how we operate our rules. You know?

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: I say again, the legislation says what the legislation says. That is, that the head of a public body must respond to a recommendation made within 30 days. I don't propose that that changes. If the head of the public body makes his recommendation or takes the recommendation made and acts on it within 30 days and rejects whatever has been recommended by the information and Privacy Commissioner, so be it.

A deemed acceptance rule, if there's disagreement with the recommendations, will certainly spur the head of the public body to react within that 30 days. A deemed rejection rule encourages the head of the public body to ignore what the Information and Privacy Commissioner has said and simply go about doing what they would have done in any case. We don't care what the Information and Privacy Commissioner says because if we don't act within 30 days her recommendations are rejected anyway and we'll do what we want. So what's the point of having an Information and Privacy Commissioner? It makes the position redundant.

With a deemed acceptance rule, you have a recommendation which if acted on within 30 days can be rejected, can be booted, can be completely ignored, but it puts the onus on the head of the public body to actually do that because if they don't there will be consequences. So you're paying your Information and Privacy Commissioner to do something that actually has some effect.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: Under current legislation are there no consequences if they don't do anything? Can you not take it to court?

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: There's nothing in the legislation that says, and there was at the beginning, six years ago or so when we started this, there was an instance in which the applicant waited over a year for the head of a public body to respond to a recommendation. The only option that person has is to go to court for an order for mandamus to compel the head of the public body to make a decision.

In the six years that I have been Information and Privacy Commissioner I know of not one matter that has gone to court under the act. Not one. Most of the people who make these applications aren't going to spend the time, aren't going to take the time or spend the money to take a decision to court. They're not. It may happen, but I would be surprised to see any real decisions under this act go to court. So I suppose what I'm saying is, what we do between the Information and Privacy Commissioners and the heads of the public bodies is pretty much going to be the bottom line decision.

In the case that you have pointed out, like I say, a year and half, it was a corporate applicant, so they had the resources to take it to court if they wanted to, but they didn't because they were frustrated. By that time, in fact, it was redundant for them as well.

CHAIRMAN (Mr. Dent): But would a deemed acceptance have made any difference then? If the deputy is not going to respond, the deputy's not going to respond. So I think that's where we're having trouble. If you get into a loggerhead where your recommendations are not going to be accepted, it doesn't matter whether it's deemed accepted or deemed refusal, does it? It still doesn't change whether or not there's a course of action. Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: I think, with respect, I disagree. I think if you have a deemed acceptance rule it would be tantamount to an order. If the Minister or the head of the public body had to respond within 30 days. A deemed acceptance would give an applicant a piece of paper that they could take to court and say, this has been deemed to be accepted; court, please enforce it. That's something that I can see happening as opposed to somebody going to court to say, please, Mr. Judge, make this Minister or make this head of the public body do what he's supposed to do. I think it's far more likely that someone is going to go to court with a piece of paper and say, I've got something that's deemed to be accepted, they're not reacting, make them. I think that would be a far more successful application, too.

CHAIRMAN (Mr. Dent): Mr. Lafferty.

MR. LAFFERTY: Thank you, Mr. Chairman. I sort of agree with Ms. Keenan-Bengts in how she's putting it forward. Somebody accepts something it's like a contract. If you don't deal with it then you face the consequences. So it's pretty simple. You talk to somebody and you make a deal. You shake hands on it, you go back on it, then you're going to have to deal with that person or somehow deal with the consequences of breaking the deal. So accepting is almost like a contract, that's the way I see it. And by deeming a refusal, it's going to go on and on. It's going to be more costly. By accepting it, there's one document. The person that's applying can always just take it to the court instead of dragging it to the courts over and over for every little item inside the document that they want to surface or to keep it under privacy. I think it's pretty simple. I'm happy.

CHAIRMAN (Mr. Dent): Mr. Bell.

MR. BELL: Obviously we can't go all morning with this, but I just want to be clear on one thing. Ms. Keenan-Bengts, under this regime where you have no order power, I think we've established that, your main concern I think you said a number of times, information might be released that shouldn't be released. That, to me, is scary. But if we take your recommendation right off the bat and then say that anything inside 30 days, any action, there's one of two things that can happen. They can positively respond or they can negatively respond to your recommendation. So they can release that information that shouldn't be released anyway within that 30 days. Now, if they haven't done that, we arrive at 30 days. One of two things can happen. If the worst-case scenario happens, it's deemed acceptance. They can still release that information that shouldn't be released at the 45th day, if we use that as an example. If it's deemed rejection, they can still release that information that shouldn't be released at day 45. It seems to me that in both events, in both scenarios, day 45 comes, they want to release that information that you've recommended they shouldn't, they can still do it. The only difference is, I can go to court after the horse is out of the barn and say, on one hand, I had a deemed acceptance from them and then they released it and the judge can sort of do whatever he can do after the fact, I don't know. Or I have a deemed rejection and I take that to the judge and say, there was a deemed rejection and they still did this. I mean, it seems to me, in any event there's nothing to stop the public head from going

against what you've recommended and letting this information out there that shouldn't be out there. In both scenarios.

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: Except in both circumstances there is an appeal period. Or at least, no. With a deemed acceptance there would be an appeal period. A third party has 30 days to go to the court and ask the court to review a decision. Without a deemed acceptance rule, a deemed rejection rule, I'm just trying, like I said, this is not straightforward legislation and you almost have to walk through it step by step. I would hope, let's put it this way. I would hope that the head of a public body who has received a document that has concerns raised in a recommendation that certain information should not be released, in most cases that, well, the act requires that the third party be given 30 days' notice and the information would not be released and the third party would have the opportunity to go to court and say, no, stop.

A deemed rejection, and I'm trying to think this through as I'm talking so it may not sound terribly intelligible. It seems to me that the deemed rejection rule doesn't, I don't know. I'd have to sit and go through it. I have gone through all the combinations and permutations. I understand where you're coming from. I understand the confusion because it is not a straightforward act. The act requires an awful lot of interpretation. I suppose I come back to, you have somebody, in theory, as Information and Privacy Commissioner who has some expertise, what I suppose I don't understand and, the word has been used, it's counterintuitive to me is why you would, the people of the Northwest Territories would pay for somebody to the Information and Privacy Commissioner if in the end that Information and Privacy Commissioner has no effective power at all. By simply ignoring you, we can make you go away. And that's what a deemed rejection rule does. All we need to do is reject, not deal with your recommendations within 30 days and we can do whatever we want. What's the point of having an Information and Privacy Commissioner? I don't see the point in those circumstances. To me that's completely counterintuitive.

CHAIRMAN (Mr. Dent): Okay. Ms. Keenan-Bengts, if I could, there's a problem if our legislation is so complex that nobody can understand it, and you've presented us with that argument today. That the legislation could only be understood by somebody like yourself who is legally trained and has all sorts of time interpreting it. That, in itself, then becomes a problem because I think most of us think that in a democratic society legislators are supposed to understand the laws that they're creating. We're supposed to understand what the purpose is and things are supposed to be fairly straightforward.

It's when I look at this situation, I'm not legally trained, I'm just, you know, a regular person that has to do the normal things to get through life and I try to relate it to my life. So when I say to my nine-year-old, Tyler, go clean up your room. If in half an hour there's been no action, I can deem that he has refused to act on my orders. And he may argue that he has accepted my order and is planning to do it tomorrow, but that's a different argument. And that's where I think I'm coming from here is that, as far as I'm

concerned I think that we shouldn't have to think about things in a convoluted way and if we do, then I would prefer that your recommendation be that we change our act so that it doesn't take somebody who spends a lot of time with it to understand how it works and keep it to the deemed refusal so that we can take a look at a non or some kind of no action and know that the body has refused to act on the recommendations.

Rather than working with making these convoluted sort of changes, let's keep it simple. I want to keep it just like the relationship I have with my son where I can very clearly know whether or not he has refused to act on a recommendation or an order and it's easy to understand. That's what we should be doing with our laws. Not trying to accommodate a law that sounds like you're telling us has been poorly written.

I still fail to see where it makes it any stronger. If the head of a public body is going to refuse to respond, you've said that if they don't respond and it's deemed refusal, they could then release the information. Well, they may have responded by not releasing information. I guess, maybe what we should take a look at or should have taken a look at is whether the Commissioner's recommendation requires action. If there has been no action taken by the public body, that is deemed refusal. Maybe that sort of response would have been better.

But right now we're at a point where I guess because, as Mr. Bell said, we don't have time to carry on all morning with this if we're going to move the bill into the House, but we need to be clear from you, I guess, what your recommendation is because if you recommend that we don't pass the bill in its current form, it won't be passed by this Assembly. So it's taken us four years to get anything before the House. Are you recommending that we leave it to the next Assembly to deal with? Because there's no way that the amendment that you're requesting now can be made in time to get it into the House in the life of this Assembly. Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: First of all, let me say, if I suggested that this was too complicated for anybody else but me to do, that wasn't the impression I meant to give by any stretch of the imagination. What I'm saying is that the area is a complicated area. What is commercial information, what isn't commercial information? There's an awful lot in the act that at first read doesn't necessarily hit you in the face.

As to your direct question, to be completely forthright and honest, I would rather see no amendments whatsoever made to this act than to see a deemed refusal passed. Yes, that would be my recommendation. Don't do it.

CHAIRMAN (Mr. Dent): Okay. But I have had indications from other members that they wish to talk, but I would suggest to committee that unless you have something that might be useful for us to have a discussion with the Minister we can talk about this issue, and then the committee is going to have to make a decision as to whether or not we wish to proceed with the bill or not. I have Mr. Braden first and then Mr. Bell. Mr. Braden.

MR. BRADEN: Thank you, Mr. Chairman. I'll try to adhere to your guidance that we needn't take all morning or all day on this. I'm glad to hear Ms. Keenan-Bengts say this is not by its nature an intuitive act, because I've been wearing out a few shovels myself trying to sort out and get to a point where I can connect the dots. And there's a lot of dots here. I guess if I bring it all down to a question, it is whether or not the motion that is proposed here to amend, 49, I guess, yes, amend 49(6), this is not even an acceptable compromise. It just doesn't...

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts won't have seen...These are committee documents and have not been shared with the public. So until we get into the clause by clause, these wouldn't normally become...

MR. BRADEN: Oh.

CHAIRMAN (Mr. Dent): I did mention to Ms. Keenan-Bengts that in terms of the issue that she raised first, before she got into the deemed refusal and deemed acceptance, that we did have a motion that would deal with that issue, but she hasn't seen it.

MR. BRADEN: Well, okay, Mr. Chairman. I guess my question will have to wait until we see whether we get to this point.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: Thank you. What provisions are there in the act that gives you any power to act on if somebody refuses to follow your recommendation?

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: That's what started this. There is nothing in the act which says what happens if; sorry...If the head of a public body decides to refuse my recommendations then the option is for the applicant to take it to court.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: Thank you. But this amendment being proposed, I guess we are suggesting that if someone does not do something or do something when they've been advised not to or recommended not to or if whoever goes, if a governing body goes contrary to your recommendation, whatever that might be, we're saying that should be deemed a refusal and I'm assuming that then that person could go and do something about it. So why would you not want that at minimum, at all? Why would you not want anything else but deemed acceptance? Wouldn't deemed refusal be better than nothing?

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts.

MS. KEENAN-BENGTS: No, I think that a deemed rejection rule will throw confusion into the works where none exists right now. If a Minister does not, within 30 days, act on

a recommendation, at least right now an applicant has the option to go to court for an order for mandamus. With a deemed refusal clause the question becomes, what's being refused? Then is the head of the public body's interpretation correct? It would be, like I said, it's at least a two-step process instead of a one-step process. I'd rather see nothing happen than a deemed refusal clause, which I sincerely believe will just create confusion.

CHAIRMAN (Mr. Dent): Mr. Nitah.

MR. NITAH: Thank you, Mr. Chairman. Mr. Chairman, I'm assuming, well, I'm pretty sure that this is not the only legislation of this nature in Canada. What do other jurisdictions use in this? Deemed refusal or is it deemed acceptance?

CHAIRMAN (Mr. Dent): Perhaps I could ask...

MR. NITAH: Could someone answer me that question?

CHAIRMAN (Mr. Dent): Mr. Thompson, could I, can you address that question?

MR. THOMPSON: I'm sorry, I'll have to get Mr. Nitah to repeat it. I was involved in a discussion over here on the side.

CHAIRMAN (Mr. Dent): Mr. Nitah, can you restate your question, please?

MR. NITAH: Thank you. The question is that, I'm pretty sure we're not in isolation here when we're dealing with these kinds of legislation. How does Alberta, how does Ontario, how does Prince Edward Island and the other provinces and territories in Canada handle this? Do they use the word deemed refusal or deemed acceptance? Thank you.

CHAIRMAN (Mr. Dent): Mr. Thompson.

MR. THOMPSON: Ms. Keenan-Bengts may have something to say about this, as well, but it's my understanding that the general rule across the country is a deemed refusal principle rather than a deemed acceptance, in that a deemed acceptance would be the exception to the way other jurisdictions deal with it.

CHAIRMAN (Mr. Dent): Ms. Keenan-Bengts, did you want to add something?

MS. KEENAN-BENGTS: I would just add that in British Columbia, Ontario, Alberta and Quebec, I believe, the legislation provides that the Information and Privacy Commissioner makes orders, binding orders. And what the Information and Privacy Commissioner says goes. Okay? So those jurisdictions are out of the loop, that they have a different scheme, a different procedure. Manitoba, Saskatchewan and most of the Maritimes, I believe, have the same kind of model that we have where the Information and Privacy Commissioner gives recommendations. I don't know, having not studied those other jurisdictions' legislation, whether any of those pieces of

legislation have dealt with instances where, as here, a decision isn't made within a certain period of time. I don't know if it exists in any other jurisdiction. It may be that every other jurisdiction the legislation is exactly the way it is here and that is that there is nothing said in it about what happens if the head of the public really doesn't respond within the 30 days. It could be that every other jurisdiction has the same vacuum that we have. I don't know.

I know that legislatively, generally, deemed rejections are what are the norm in terms of various kinds of legislation. In terms of information and privacy legislation, I don't know that any jurisdiction has a consequence for failure to respond. I'm not sure that helps.

CHAIRMAN (Mr. Dent): Mr. Nitah.

MR. NITAH: Thank you, Mr. Chairman. Mr. Chairman, well, I agree with Ms. Keenan-Bengts, I'm not sure if that helps either. It's confusing. One of the things I worry about when I'm faced with these decisions, especially when it deals with privacy and access to information, is the right of mobility of Canadians who move across the country to work and live anywhere, and consistency is important in that area. I'm sure if this is legislation that we've been dealing with for four years now, we should have some concrete information on how other jurisdictions deal with this kind of legislation and these kinds of matters, so that to ensure mobility and consistency across the country is protected, well, it's protected in the Charter and the Constitution.

Obviously, we don't have time to get into all of that information at this time, so it's pretty hard for me to say either way which is right and which is wrong at this point in time, recognizing the time constraint that we're dealing with right now. That's just for my...

CHAIRMAN (Mr. Dent): You might be interested, Mr. Nitah, if you look at page 3 of the briefing note that committee members have. Unfortunately it was prepared by a member of our research staff who isn't here today, so we can't question her on it directly. But on page 3 at the top she indicates that access to information and protection of privacy practices across Canada were reviewed and the deemed refusal rule has never been found to cause confusion or to reverse a Commissioner's order. So we can't ask if she actually posed that question specifically to each jurisdiction, but from the way it's written it sounds like she contacted them to do it. But she's not here today, so we can't confirm that. Okay. But I think at this point we've gone around this issue, we've done it for a number of years. Part of the problem may be that it relates to the nature, there are different ways of dealing with things, whether it's an ombuds-like position or whether you have prescriptive powers as the Commissioner. I think it would be important now for committee to have some discussion with the Minister, and then I think the committee's going to have to have some discussion with itself and determine where we go on this issue.

So, Ms. Keenan-Bengts, I'd like to thank you for your time. I think you are aware that this committee has spent a considerable amount of time over the years with you and with itself wrestling with not only this problem, but other areas in this legislation. I assure

you that it's never been the committee's position that there's a concern about granting too much power. It really does come down to, I think, an issue of people wanting to really understand what it is that we're doing. I'm concerned from the discussion and the length of time we've had over it, that there may be a problem with the complexity of our law. If it isn't as intuitive as it should be, I think.

Having said that, the committee is going to have to have some discussion with the Minister and we'll have to then consider and weigh the recommendations that we have in our discussions with our staff and decide which way to go. Thank you very much for your time and interest in this today.

MS. KEENAN-BENGTS: Simply as a parting comment, I would say that this legislation, wherever it exists, is going to be complicated because it is a balancing of access to information and protection of privacy which in some cases are going to collide. That's what makes the act and the area complicated and sometimes difficult to interpret.

CHAIRMAN (Mr. Dent): Thank you very much.

MS. KEENAN-BENGTS: Thank you.

CHAIRMAN (Mr. Dent): Okay. If members are okay, we'll try and bring the Minister in right away and then we'll probably have to have a little bit of an in camera at some point today before we determine whether or not to do clause by clause. We should warn members that we are getting to the point now where we're liable to have to go through the lunch hour in order to get things done here. There are an awful lot of things on our agenda and we're not moving along as quickly as I thought we would.

---SHORT RECESS

CHAIRMAN (Mr. Dent): I'd like to call the committee back to order. We're still on item number five, which is a review of the amendment, the Act to Amend the Access to Information and Protection of Privacy Act and we have with us the Minister of Justice to review the act. Welcome, Minister Allen. Perhaps just to set the stage for you, I'm sure your staff will inform you of it. Committee just had a presentation from the Access to Information and Protection of Privacy Commissioner at which she recommended that we not proceed with this bill in its current form because she feels very strongly that we should change or any amendments to the act should involve a deemed acceptance of her recommendations after 30 days rather than a deemed refusal, which is what's encompassed in the act as it's drafted right now.

So perhaps, Minister Allen, I can ask you to introduce the members of your team and then begin with any opening comments you may have, and then we'd really hope that you could move very quickly with your staff into addressing the Commissioner's concerns about the deemed refusal. Minister Allen.

HON. ROGER ALLEN: Thank you, Mr. Chairman. For the record, I have Janis Cooper, legislative counsel, legislation division; Cayley Thomas, legal counsel, policy and planning; and Janice Laycock, acting director of policy and planning.

Mr. Chairman, I have no opening remarks or any comments at this point and I will ask if we can proceed. I must, for the record, catch a flight at noon to Inuvik. Thank you.

CHAIRMAN (Mr. Dent): Okay. Well, perhaps, Minister Allen, you could begin by either yourself or having your staff provide the department's perspective on why a deemed refusal is better than a deemed acceptance.

HON. ROGER ALLEN: Thank you, Mr. Chairman. I'll ask Ms. Laycock to begin explaining.

CHAIRMAN (Mr. Dent): Ms. Laycock.

MS. LAYCOCK: Yes. On the request of the committee we looked at this problem with a situation where there has been a decision made and the Commissioner has been asked to review it, and she has reviewed it and there has been no response from the department. I just want to say that in the records that we have, this has only happened once since the act came into force. So we're dealing with a situation where the act says very clearly that the head will respond to the recommendation of the Commissioner within 30 days, and according to our records this has only happened once where there was no response. So we're dealing with a situation that is not common. It's very rare. So we're trying to sort of work with the legislation to try to correct something that is dealt with in the legislation.

Anyway, so we looked at the various ways we could deal with it and we did look at the Commissioner's recommendation of acceptance and we had some problems with including acceptance. Some of them had been discussed earlier, including we looked at what other jurisdictions were doing. Some with similar schemes to ours. We looked at what could be the result of a deemed acceptance. We were mainly trying to look at what was best for the applicant because in a situation where there's no response, the applicant or the third party has nothing to appeal to. So they're just kind of left sitting there in limbo. So we wanted a solution. If we're bringing forward a solution to this, we wanted it to be something that would serve the applicant, that would be helpful to them.

So we did look at a strict deemed refusal situation. We came up with some problems with that because we could be refusing agreement, and that was the concern I think the committee raised earlier as well. That you end up with this weird situation where you're disagreeing with something that we've already agreed on. So the present scheme that we've developed deals with that problem and it also provides the applicant with something that they can appeal to.

It does change the reporting regime somewhat because there's not a requirement for the department to report back if there is agreement. I mean, presently if we agree with

the Commissioner we write a response back saying thank you, we all agree, isn't it great. This would allow for recommendations to be only where there's disagreement. So we would be dealing with the disagreement, we would be deeming refusal to that disagreement. So if we say yes, she says no, we don't respond, it goes back to what we had originally said.

The other thing that we thought about in terms of this scheme was that it also is consistent with how the act is set out. We felt that deemed acceptance provided the Commissioner with, it set up a different regime for the Commissioner because if there's deemed acceptance then her recommendations aren't just something that we'd look at. They're something that actually have a force in law. So that changes. It gives her an order-like power in the legislation. So that changes the setup that we have in the legislation.

So those were the kinds of things that we were looking at. That's what we were trying to do with the solution that we came forward with.

CHAIRMAN (Mr. Dent): Thank you. Ms. Lee.

General Comments

MS. LEE: Thank you. I have a question to Ms. Laycock. From what you've said, the Commissioner said that she didn't want anything to go ahead if the change in motion is not to install deemed approved or deemed acceptance. She said that it's better to have it the way it is now because the way it is now is if the applicant doesn't get what she's asking for, or he, could go to court to get a mandamus order. But you just stated that as it is now, the applicant has no options and that's why you wanted to be able to provide them with deemed refusal applications. So there's a little bit of discrepancy in what we're hearing. Could you clarify where you stand on that? Thank you.

CHAIRMAN (Mr. Dent): Ms. Laycock.

MS. LAYCOCK: I'd like to ask Cayley Thomas if she could respond to that.

CHAIRMAN (Mr. Dent): Ms. Thomas.

MS. THOMAS: What we have now in the legislation is a situation where if the head of a public body doesn't respond, the applicant or the third party is in limbo. They can't follow the appeal provisions of the act because they have nothing to appeal from. So we were looking at giving finality to that so there is a next step. There is not that waiting period where you don't know what your options are. If there is a deemed refusal you know what the decision is. If you're the applicant or the third party and you disagree with that, you go and you say, I don't like this decision, I would like the court to look at this issue. And the court looks at it as though it is a new issue. The same issues are argued in front of the court.

If it is a deemed acceptance, what you're going for, you're not arguing with the decision because you like the decision. The decision is what you asked for. You're going to ask for enforcement, which is a whole different issue. That becomes a mandamus application, as Ms. Keenan-Bengts said. You're back in that very complex area of law where you're trying to get the court not to answer the issue of should I have these documents, shouldn't I have the documents, if that's what the issue was, but to force the government to do something. And it's a very complicated area of law and that's what we were trying to avoid. To get out of that, no, yes, you do have a step, but it is such a step that people probably won't take it. The deemed refusal gives them a simple right of appeal.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: So then it's not correct in the Commissioner saying that as the law currently exists that an applicant has been refused an action or information could go for mandamus application, because that would only happen if you had deemed approval. Because it's asking the court to have the body do what the Commissioner has recommended to do. Do you know what I'm saying? Was she correct in saying that without this amendment that an applicant has the power to go to court for a mandamus application?

CHAIRMAN (Mr. Dent): Ms. Thomas.

MS. THOMAS: Right now, if there's no response, the application that an applicant would take to court is a prerogative writ application to direct the government to do what they're supposed to do. So they would have to go to court to try to get that answer and the answer may be a deemed refusal. And it probably would be in the end, but there's an extra step of having to go to court to ask the government, or the head, to make an answer.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: In just a follow-up question on deemed refusal, we've been told many a time here that there's a problem with deemed refusal because there might be a confusion about what's being refused and not being refused because, you know, there could be cases where a head of public body does things partly, or some things, but not all others. First of all, I don't see why that's a problem, I just think, you know, if somebody asked for information and they asked for one, two, three and the body gives one, two and not three, I mean, it's pretty clear to me what they're refusing. So I don't understand the confusion in the first place. Maybe I could get some information about that.

The second place is, Ms. Laycock explained...Is that Laycock? I'm sorry if I'm saying it wrong. Ms. Laycock stated in her presentation that you have taken effective measures to clarify that conclusion. Is there, is there some...Am I wrong in hearing? I thought you said something about we understand that there's some confusion there and we want to correct that and, so what are those measures?

CHAIRMAN (Mr. Dent): Ms. Laycock was talking about, as the act the stands right now there is, since there is no deemed refusal, if nothing happens everything is in limbo. But this amendment will at least say if for 30 days there's been no action it's deemed that the body has refused to act. So that's bringing some finality to it right now. Is that your question?

MS. LEE: Okay, let me ask that again. If we didn't have any amendments at all, under the existing act is there confusion about what's being refused if...

CHAIRMAN (Mr. Dent): If there's no response.

MS. LEE: If there's no response.

CHAIRMAN (Mr. Dent): If the public body doesn't do anything.

MS. LEE: Or it does partly. Or does only some things and not others. Why is that confusing? Isn't that clear what they're not doing?

CHAIRMAN (Mr. Dent): Ms. Laycock.

MS. LAYCOCK: I'd like Ms. Thomas to answer that.

CHAIRMAN (Mr. Dent): Okay. Ms. Thomas.

MS. THOMAS: Thank you. I think I understand the question. What Ms. Laycock was referring to is this double-negative that the Commissioner has raised. What if they agree with me, but they don't respond? That means they disagree and it creates confusion. So what the bill that's in front of you contains is a provision where if there's agreement, there is no need for a response. So we don't have that double-negative. There is no thank you for your agreeing with us. The original decision stands.

What happens is, then, the Commissioner would make recommendations only on those points that she disagrees with. If she agrees that pages 1 to 20 should be released, she doesn't need to make that recommendation. She would recommend, but I recommend that you block out the name on page 5. That's what has to be responded to. So we've tried to narrow down those types of things that require a response and those types of things that are in agreement. Thank you.

CHAIRMAN (Mr. Dent): Okay. Are there any further questions for the Minister or his staff? Mr. Braden.

MR. BRADEN: Mr. Chairman, I just have to say that the complexity of this is, I can't comprehend really what's going on. I'm lost in this, I fully and freely admit. I have to say that I'm very uncomfortable at least with how this is being played out before us in being asked to make a decision. I just don't know if I'll be able to.

But in trying to arrive at some kind of solution to this, between the department and the Commissioner and the committee here, I'm curious to see what kind of consultation or collaboration has gone on. Has everybody really sort of made best efforts to come up with a compromise that they could bring to committee? Or are we being asked to arbitrate on a really substantive difference on approach between committee and the Commissioner here? Because I, for one, am totally ill-equipped to deal with something of this nature. I'd like to go back and see, has there really been an effort to reach some kind of compromise here because I'm lost on this one. Thank you.

CHAIRMAN (Mr. Dent): I'm not sure it's fair to put that question to the Minister and his department at this point, because you have to remember, Mr. Braden, that in two reports to the House this committee has rejected that request by the Commissioner. So our committee has never accepted the Commissioner's recommendation and have always said to the government, you know, go ahead with deemed refusal. So in terms of, you know, we've had this conversation on three separate occasions at least with the Commissioner and to this point, and up until today, at the previous meetings the committee was not convinced by her arguments and did not ask the government to respond. In fact, we directed the government to go ahead with the deemed refusal. So in terms of asking whether or not there's been an attempt to compromise, I think the government has worked with the committee, responded to the committee's request and direction when preparing the legislation. But we have clearly rejected her recommendation in the previous meetings that we have had with her. So, can committee change its mind? Of course it can. But I don't think you can ask the government if they've worked in the spirit of cooperation with her because they're working with us. Mr. Braden.

MR. BRADEN: So then the amendments that are proposed in the bill here leave that whole area untouched. Nothing is being proposed to change.

CHAIRMAN (Mr. Dent): No, the committee did direct that the government move forward with a deemed refusal. These amendments will, or this bill will amend the Access to Information and Protection of Privacy Act to put in the deemed refusal, because, as things stand right now, there's nothing in there speaking about refusal and acceptance if no action is taken by the public body. So the government has, in fact, responded to the reports that our committee has tabled in the legislature, which have been voted on and accepted in the legislature. So they've done basically what we told them to do. Mr. Lafferty.

MR. LAFFERTY: Thank you, Mr. Chairman. I thought I was pretty straightforward this morning, but now I'm totally confused with the answer from Ms. Thomas to Ms. Lee. What she said is, after communicating with the Commissioner with the deemed refusal, they make an agreement and then there's no need for a response. Isn't that what the Commissioner is asking for now? That deemed acceptance is the same thing as an agreement, so there is no need for a response. And that's how she answered Ms. Lee's questions. So I think we're all saying, what's being said there is what the Commissioner's asking for.

The other thing the Commissioner has mentioned is that it's up to the applicant to take the extra steps to get the information that they're happy with. If the department head or public body head doesn't want to give the information or all of it or they want to drag it on for six years, it could happen. Maybe they responded within 30 days, but they may have responded with just one recommendation. If there are 25 recommendations, they can just drag it on forever and ever. That was one of the things she said.

So what we're doing now is we're putting the onus on the applicant to continue taking it to the court after at extra cost to them. Whereas, if we were to go with the deemed acceptance there's just one step. They take that information, if there's something wrong with that information, it's not acceptable, then it goes to the court and then the courts deal with it.

So on one hand we're saying we're going to follow the rest of Canada, but the rest of Canada is party politics. We're the only consensus government here. It seems to me that every time something happens down south we have to follow it. We're different. We're not the same as them. You know? Even the provinces are all different too. They're split down the middle on this issue. Some of them give powers, some of them don't. So where do we go? What do we do? Who are we thinking of when we're making this amendment? Are we thinking of the applicant or are we trying to protect the industry? What is going on here? We need to decide that. We don't need to follow people around and do whatever they do. I know we're going to be coming up with a bill pretty soon to deal with that. What's happening down south, you see it in the news all the time.

So I don't know, the answer that was given there, I had to write it down because it sort of said the same thing the Commissioner is asking for. Thank you.

CHAIRMAN (Mr. Dent): Ms. Thomas.

MS. THOMAS: I apologize; I probably shouldn't have had the two cups of coffee before I started speaking. What we have done is we've dealt with, in the bill, one of the issues that the Commissioner has. That is where both the head of the public body and the Commissioner are in agreement. That's the area where there's no need for a response. There's no need to have any deemed decision at the end because we don't require a response. The original decision stands. So I hope that clarifies it somewhat. The issues exist where the Commissioner and the head of the public body disagree. And that's where the bill before you says, where there's a disagreement it's deemed refusal. Thank you.

CHAIRMAN (Mr. Dent): Ms. Lee.

MS. LEE: Yes, just a short comment here. I guess we're going to speak about this in camera, but I just want to put it on public record. How I understand this is, the Commissioner has identified a gap in the legislation where if a public body or a deputy minister or president of Aurora College or whatever refuses, there is uncertainty in the

law. Nobody knows what an applicant can do if they get refused information. So she identified a problem. The option is either that we deem it to be that they have accepted her application or rejected it. I'm trying to be convinced to be for the Commissioner's position, which is to say if they don't do anything that means they agree with my application. Make them do it or the applicant can go and enforce that decision. It's like getting a judgement already. Whatever the Commissioner says is the right thing. I don't agree with that and it's not because the rest of Canada says it.

I mean, it's usually because, well, we do look at what the rest of Canada does and we're being asked to take two steps rather than one. Which is, one is if they don't do anything that means they've refused. But I think we have to do something. We have a problem here because the Commissioner says if you're going to do that I'd rather you don't do anything at all. I mean, that's a problem because I would hate to go to legislation with the Commissioner in charge of that very act not supporting us. But I do think we have a public interest that we have to protect here. There's obviously a gap in the legislation. We have to do something about it.

I wanted to be convinced by her presentation today as to why we should take that two steps rather than saying if they say no, if they don't do anything it's no. But she wants us to go further and say if they don't do anything, that means they accept with what I'm saying. Which is like, it's imposing, by law, a positive action that's a lot further than what we would do otherwise.

I think we really have a question on our hands about what do we do. I don't think it's a simple option for us not to do anything at all. I think there's still a glaring gap in the legislation. She has pointed this out to us. She doesn't agree with our recommendation, but I think we should still do something and we should do it as a...If they don't do it, then obviously it's deemed refusal. And an applicant should have an option to take that to court or go somewhere and do something about it.

So it hasn't got anything to do with what the rest of the country does. If we're doing something that's completely different than the rest of the country, we need more evidence to convince us, that's all.

CHAIRMAN (Mr. Dent): Mr. Bell.

MR. BELL: Just in the opinion of the department, does this come down to a decision about whether or not we want the Commissioner to have defacto order power? I mean, we've decided we want a regime that doesn't have order power. The Commissioner makes recommendations. But I think as Ms. Thomas has laid this out, if there is deemed refusal, sorry, deemed acceptance you simply take that to court and you get it enforced. That is the same thing as having order power, I would say. I don't think the courts are going to turn around and say, well, you knew in the legislation this was acceptance. They're going to enforce that. It's order power. The flip side is, if it's done the other way then the merits of the case are heard all over again in front of the judge, I think it's been put out to us here. And so does it not really come down to, all the smoke

aside, do we want the Commissioner to have order power or not? Do we want the office to have order power? I think that's what this is really turning on. I'm not asking if they believe the Commissioner should have order power. I'm saying that, in effect, is what this boils down to because of a deemed acceptance would be defacto order power. Maybe that's legally not correct, but is it not pragmatically the same thing?

CHAIRMAN (Mr. Dent): Ms. Thomas. Ms. Laycock.

MS. LAYCOCK: Yes. I think that you're right. I think that's part of our problem with this approach.

CHAIRMAN (Mr. Dent): Ms. Peterson.

MS. PETERSON: A couple of points. One, I agree with what Ms. Lee says. I think it's important that something be done in this particular section so that parties are not left in limbo. So, committee has previously recommended a deemed refusal, which is not an unusual solution in the sense that some of the other jurisdictions have adopted that. In terms of what Mr. Lafferty has said, that that puts an additional onus on the applicant if we deal with it as a deemed refusal, namely they have to appeal. I'm not convinced that there's not also an additional step required by an applicant if there's deemed acceptance because the applicant may well have to enforce that deemed acceptance and that is a step that would have to be taken in terms of legal proceedings.

The other thing that's bothering me -- and I'm sorry I wasn't here for the earlier part of the Commissioner's recommendations -- the appeal sections start right after this section in the Access to Information and Protection of Privacy Act. So you've got a report. The head of the public body should do something about it within 30 days, and there's this sort of empty place where if they don't respond then what happens. Then we go on to the appeal provisions in the act and the appeal provisions say an applicant, namely someone who makes an application under the act, or a third party may appeal a decision. That's where we'd kick into if there's deemed refusal. Right? The government can't appeal. So if there's a deemed acceptance and they disagree and after the fact are saying, you know, holy smokes, we've got a deemed acceptance on our hands here and we didn't respond in time and that was an oversight on our part and we should have, but we strongly disagree with this. I think there are some problems in terms of the appeal remedies there because there aren't any.

I'm satisfied with the work that the department has done in terms of the policy framework and how they have looked at the recommendations from this committee. The interests of the applicant, who is really the person that we have to be concerned about in access to information and protection of privacy legislation, are best fostered by a deemed refusal. It's pretty straightforward. There's only confusion if you really want to make it confusing and import confusing into that. Of course there's not going to be confusion where the department agrees with the applicant on release of certain aspects of their request.

I don't think it's that complicated, I really don't. I don't think it's that dangerous. I don't think it's that difficult and I don't think it places a lot of onus on an applicant. I think the Access to Information and Protection of Privacy Commissioner doesn't like it and I think that's unfortunate. But I don't think that it's a lot more than that. Committee has, you know, there's a difference of opinion on this; as there is, from time to time, a difference of opinion on approaches.

But I have more concerns about the deemed acceptance, way more concerns about the deemed acceptance in terms of the structure of the act and the role of the Access to Information and Protection of Privacy Commissioner and the appeal provisions than I do with the deemed refusal. Thank you, Mr. Chairman.

CHAIRMAN (Mr. Dent): Thank you. I don't have any more names on my list of people to speak. The Minister has advised us that he has to leave. Minister Allen, do you have to leave for a flight at 12:00 or do you have to leave the building at 12:00? I guess it would be important for us to know that. Minister Allen.

HON. ROGER ALLEN: Thank you, Mr. Chairman. No, I'm going to be leaving the building by noon.

CHAIRMAN (Mr. Dent): Okay. I think committee needs five or 10 minutes of in camera time, Minister Allen, to discuss this and we'll hopefully get back to you either to schedule the clause by clause in 10 or 15 minutes or we'll maybe have to do it later. We'll see. We don't have any more than that. Actually, Minister Allen, perhaps before you leave the table, would you be comfortable having another Minister stand in for you this afternoon if it takes us a while to get through this?

HON. ROGER ALLEN: Yes, certainly.

CHAIRMAN (Mr. Dent): I need it for the record, please. Minister Allen.

HON. ROGER ALLEN: My apologies.

CHAIRMAN (Mr. Dent): So this afternoon, could we find another Minister to stand in in your place for this bill if we decide to do the clause by clause this afternoon?

HON. ROGER ALLEN: Yes, thank you, Mr. Chairman. I'll make the arrangements to have another Minister stand in for me in my absence. Thank you.

CHAIRMAN (Mr. Dent): Thank you. Okay, we'll go in camera now. Thank you.

---SHORT RECESS

CHAIRMAN (Mr. Dent): Okay. We'll come back to order. We're continuing with item number five on our agenda this morning, which is public consideration of Bill 27, An Act to Amend the Access to Information and Protection of Privacy Act. We are right now

resuming our consideration with the Minister. Just, again for the record, Minister Allen, could you introduce your staff before we proceed again, please.

HON. ROGER ALLEN: Thank you, Mr. Chairman. To my left is Janis Cooper, legal counsel for the legislation division. To my extreme right is Cayley Thomas, legal counsel, policy and planning, and to my right here is Janice Laycock, acting director of policy and planning. That's the team from Justice. Thank you.

CHAIRMAN (Mr. Dent): Okay. Thank you very much. So, committee, are we prepared to consider Bill 27 clause by clause?

SOME HON. MEMBERS: Agreed.

Clause by Clause

CHAIRMAN (Mr. Dent): Okay. Bill 27, An Act to Amend the Access to Information and Protection of Privacy Act. Clause 1.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 2.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 3.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 4.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 5.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 6.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 7.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 8. Mr. Roland.

Motion To Amend Clause 8 Of Bill 27, Carried

MR. ROLAND: Mr. Chairman, I move that Clause 8 of Bill 27 be amended by

(a) repealing proposed section 49.5; and
(b) renumbering proposed section 49.6 as section 49.5. Thank you.

CHAIRMAN (Mr. Dent): Thank you. The motion is in order. To the motion.

SOME HON. MEMBERS: Question.

CHAIRMAN (Mr. Dent): Question has been called. All those in favour? All those opposed? The motion is carried.

---Carried

Minister Allen, do you concur?

HON. ROGER ALLEN: Thank you, Mr. Chairman. Yes, I do concur.

CHAIRMAN (Mr. Dent): Thank you. Clause 8 as amended. Mr. Roland.

Motion To Amend Clause 8 Of Bill 27, Carried

MR. ROLAND: Mr. Chairman, I move that Clause 8 of Bill 27 be amended by adding the following after proposed section 49.5:

49.6 Within 90 days after receiving the report of the Information and Privacy Commissioner under section 49.5, the head of the public body concerned shall

(a) make a decision to follow the recommendation of the Information and Privacy Commissioner or make any other decision the head

considers appropriate; and

(b) give written notice of the decision to the Information and Privacy Commissioner and the individual who requested the review under subsection 49.1(1).

Thank you.

CHAIRMAN (Mr. Dent): Thank you. The motion is in order. To the motion.

SOME HON. MEMBERS: Question.

CHAIRMAN (Mr. Dent): Question has been called. All those in favour? All those opposed? The motion is carried.

---Carried

Minister Allen, do you concur?

HON. ROGER ALLEN: Thank you, Mr. Chairman. Yes, I do concur.

CHAIRMAN (Mr. Dent): Thank you. Clause 8 as amended.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Clause 9.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): The bill as a whole as amended.

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Does the committee agree that Bill 27 is ready for consideration in Committee of the Whole as amended?

SOME HON. MEMBERS: Agreed.

---Agreed

CHAIRMAN (Mr. Dent): Mr. Nitah.

Motion To Reprint Bill 27, As Amended, And Report As Ready For Committee Of The Whole, Carried

MR. NITAH: Thank you, Mr. Chairman. Mr. Chairman, I move that Bill 27, An Act to Amend the Access to Information and Protection of Privacy Act, be reprinted, as amended, and reported to the Assembly as ready for Committee of the Whole. Thank you, Mr. Chairman.

CHAIRMAN (Mr. Dent): The motion is in order. To the motion.

SOME HON. MEMBERS: Question.

CHAIRMAN (Mr. Dent): Question has been called. All those in favour? All those opposed? The motion is carried.

---Carried

Bill 27 will be reprinted as amended and reported to Committee of the Whole as ready for consideration, or ready for consideration in Committee of the Whole. Thank you, Minister Allen. Thank you to your staff. We've been a long time awaiting this. It will be, I'm sure, an interesting time when it gets presented in the House. Thank you.

Now, members, if you could stick around we'll resume our committee meeting with the Minister of Education, Culture and Employment.

---ADJOURNMENT